

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALD VANCE and NATHAN ERTEL, } No. 06 C 6964
Plaintiffs, } Chicago, Illinois
-vs- } March 25, 2010
DONALD RUMSFELD and } 9:00 o'clock a.m.
UNIDENTIFIED AGENTS, }
Defendants. }

TRANSCRIPT OF PROCEEDINGS - STATUS
BEFORE THE HONORABLE WAYNE R. ANDERSEN

APPEARANCES:

For the Plaintiffs: LOEVY & LOEVY
312 North May Street
Suite 100
Chicago, Illinois 60607
BY: MR. RUSSELL R. AINSWORTH

For the Defendant: U.S. DEPARTMENT OF JUSTICE
1425 New York Avenue, NW
Washington, D.C. 20005
BY: MR. JAMES R. WHITMAN

Court Reporter: ROSEMARY SCARPELLI
219 South Dearborn Street
Room 1412
Chicago, Illinois 60604
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1 THE CLERK: Case No. 6 C 6964, Vance versus
2 Rumsfeld.

3 THE COURT: Hi.

4 MR. AINSWORTH: Good morning, your Honor, Russell
5 Ainsworth on behalf of the plaintiffs.

6 MR. WHITMAN: Good morning, your Honor, James
7 Whitman on behalf of the defendants.

8 THE COURT: Thanks for coming.

9 Now, a notice of appeal was filed?

10 MR. WHITMAN: It was, your Honor, last Friday.

11 MR. AINSWORTH: Phase two.

12 THE COURT: On the qualified immunity issue?

13 MR. WHITMAN: Correct.

14 THE COURT: So what would you like to do? Should
15 we just see how this gets resolved?

16 MR. AINSWORTH: Well, Judge, we do currently have a
17 pending motion to compel before Judge Keys to discover the
18 identities of the unknown defendants. The parties have a
19 dispute as to the scope of limited discovery that was ordered
20 by Judge Keys in this Court. There is also a --

21 THE COURT: So he is -- he is going to meet with
22 you to try to resolve that?

23 MR. AINSWORTH: It has been fully briefed and it is
24 pending before him.

25 THE COURT: Okay.

1 MR. AINSWORTH: And the United States has a fully
2 briefed motion, their second motion to dismiss, pending
3 before this Court.

4 THE COURT: Do you want me to attend to it or do
5 you want to wait until the Court of Appeals does whatever it
6 is going to do?

7 MR. WHITMAN: Well, on that, your Honor, just in
8 full disclosure to the Court and to opposing counsel, wanted
9 to let your Honor know that we are -- we have prepared a
10 motion for certification. I don't know if your Honor
11 remembers, but the motion -- the United States filed a motion
12 to dismiss a couple years ago. Your Honor ruled on that, I
13 think, back in July of 2009.

14 One of the issues in that was whether the claim
15 against the United States was barred by the military
16 authority exception under the Administrative Procedure Act.
17 And now that defendant Rumsfeld has filed a notice of appeal,
18 we were planning on asking the Court to certify that issue on
19 the military authority exception for interlocutory appeal
20 under 1292(b) to go up to the 7th Circuit along with
21 Secretary Rumsfeld's notice of appeal.

22 We are just waiting -- we have -- we have prepared
23 a motion for certification. We are just waiting for the
24 Solicitor General to approve that so that we can file that
25 with the Court. And then at this same time we were planning

1 on filing a motion to stay the proceedings, as your Honor had
2 indicated, so the 7th Circuit can kind of decide everything
3 all at once rather than have proceedings here continue on.

4 MR. AINSWORTH: That is not the traditional run of
5 course in this Court. The United States has previously moved
6 to stay all proceedings against it because of a potential
7 qualified immunity defense, and this Court rejected that.
8 There is no reason --

9 THE COURT: So -- so you don't think you want to
10 assent to anything he said?

11 MR. AINSWORTH: Fair enough, Judge. Fair to say.

12 THE COURT: Well, no, I mean there is a high level
13 of civility, but you don't agree with him either
14 substantively or procedurally?

15 MR. AINSWORTH: Correct.

16 THE COURT: And you don't want to like just be
17 devoting your resources to dealing with the 7th Circuit, you
18 would rather fight on both fronts?

19 MR. AINSWORTH: That's correct, Judge.

20 THE COURT: Okay. So he is going to file his
21 motion for certification. Do you want to file a response to
22 that?

23 MR. AINSWORTH: We would like to, Judge.

24 THE COURT: When would you like to do that?

25 MR. AINSWORTH: When will the motion be filed?

1 THE COURT: You know, we -- when will it be filed?
2 MR. WHITMAN: We are -- we are -- hopefully within
3 the next week, your Honor. Like I said, we are waiting SG
4 approval on that.

5 THE COURT: So --

6 MR. AINSWORTH: Two weeks from the date of his --
7 or -- so do you want to give him Friday?

8 THE COURT: So shall we say April 23rd?

9 MR. WHITMAN: For a response?

10 THE COURT: Yes.

11 MR. WHITMAN: That is fine with me, your Honor.

12 THE COURT: Do you want to file a reply?

13 MR. WHITMAN: And if it takes us longer to file the
14 motion initially, then we are more than happy to work out a
15 briefing schedule.

16 THE COURT: Yes. If you do, just send an agreed
17 briefing schedule order. Okay? Would you like a week to
18 reply after that or what would you --

19 MR. WHITMAN: If we could have two weeks.

20 THE COURT: I mean, you know, the goal is, if you
21 achieve this, you don't want this to lag so far behind that
22 it messes up the consideration at the 7th Circuit either.

23 MR. WHITMAN: Right.

24 THE COURT: So this motion for certification I will
25 begin thinking about, let's say, about 6:00 o'clock tonight.

1 And then -- because if we are going to do it, then they might
2 as well be done in tandem so you are not juggling schedules
3 up there as well. All right?

4 Okay. So we will say your response to the motion
5 for -- let's say the motion for certification is due
6 April 9th, the response April 23rd and the reply April 30th.
7 And then I will try to be thinking about it so that I will
8 rule quickly on it.

9 And, you know, I still say, you know, if the
10 plaintiffs are right as to what happened, the Government --
11 you know, our Government should make them some offer even if
12 -- even if there were no procedural missteps, if they were
13 wrongly detained and hurt, you know, you ought to -- I
14 believe that they are citizens of the United States. If what
15 they are saying is true, then an offer ought to be made
16 rather than, you know, the slicing and dicing of procedural
17 fighting all the way. That is all.

18 MR. WHITMAN: Understand, your Honor.

19 THE COURT: Okay.

20 MR. AISNWORTH: And we will continue before Judge
21 Keys and --

22 THE COURT: Super. Yes. You know, and then --
23 yes, if you want to file a motion to stay as well, you could
24 file that in tandem with the motion for certification, and
25 then I will -- the same briefing schedule would apply. And I

1 will do my best to think about that simultaneously as quickly
2 as possible.

3 All right?

4 MR. WHITMAN: Much appreciated, your Honor.

5 MR. AINSWORTH: Very good, Judge.

6 THE COURT: Thank you. Thanks for coming in.

7 MR. WHITMAN: Thank you.

8 MR. AINSWORTH: Thank you.

9 THE COURT: Have a great day.

10 MR. WHITMAN: You too.

11 (Discussion held off the record.)

12 THE COURT: Good point.

13 What do you want us to do with the current motion
14 to dismiss that -- the one that is still out there?

15 MR. AINSWORTH: Deny it, Judge.

16 THE COURT: Have you filed anything in response?

17 MR. WHITMAN: Strike that, your Honor.

18 THE COURT: Have you filed anything in -- have you
19 briefed it already?

20 MR. AINSWORTH: It is fully briefed, Judge.

21 MR. WHITMAN: I think the reply brief came in on
22 March 5th. It has just been a few weeks.

23 THE COURT: Oh. So that is something I have under
24 advisement right now. All right.

25 MR. WHITMAN: Right.

1 THE COURT: And you would both like me to consider
2 it. All right.

3 MR. WHITMAN: Yes, Judge.

4 THE COURT: You have opposite conclusions. Okay.
5 So we will work on that.

6 MR. WHITMAN: Thank you, your Honor.

7 THE COURT: Thanks for being here.

8 (Which were all the proceedings heard.)

9 CERTIFICATE

10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.

13 s/Rosemary Scarpelli/

14 Date: March 31, 2010

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